

August 23, 2012

Carmelita Garcia
P.O. Box 834
Pacific Grove, CA 93950

Re: Your Request for Informal Assistance
Our File No. I-12-124

Dear Ms. Garcia:

This letter responds to your request for advice regarding the provisions of the Political Reform Act (the “Act”).¹ This letter is based on the facts presented. The Fair Political Practices Commission (the “Commission”) does not act as a finder of fact when it renders assistance. (*In re Oglesby* (1975) 1 FPPC Ops. 71.) Additionally, nothing in this letter should be construed to evaluate any conduct that has already taken place. Because your question is general in nature, we are treating your request as one for informal assistance.²

Please note that the Commission does not provide advice on bodies of law outside the confines of the Act. Thus, we offer no opinion on the application of other incompatible activities and conflict-of-interest laws that may apply including, but not limited to, common law conflict of interest and Government Code Section 1090.

QUESTION

Does the Act prohibit you from simultaneously holding two offices, as the mayor of a city and as a member of a joint powers authority, considering the fact that the city is a partner in a desalinization project that will be competing with water projects by the joint powers authority and a previous contribution from the city’s private partner in the desalinization project?

¹ The Political Reform Act is contained in Government Code Sections 81000 through 91014. All statutory references are to the Government Code, unless otherwise indicated. The regulations of the Fair Political Practices Commission are contained in Sections 18110 through 18997 of Title 2 of the California Code of Regulations. All regulatory references are to Title 2, Division 6 of the California Code of Regulations, unless otherwise indicated.

² Informal assistance does not provide the requestor with the immunity provided by an opinion or formal written advice. (Section 83114; Regulation 18329(c)(3).)

CONCLUSION

In itself, holding two offices simultaneously does not create a potentially disqualifying conflict of interest under the Act. However, considering the contribution from the city's partner in the desalinization project, Section 84308 of the Act prohibits you from taking part in a proceeding involving a license, permit, or other entitlement for use pending before the MPRWA if the partner is a party or participant in the proceeding and you have received contributions aggregating to more than \$250 from the partner in the preceding 12 months.

FACTS

You are the Mayor of the City of Pacific Grove. You also represent the City of Pacific Grove as an appointed member of the Monterey Peninsula Regional Water Authority (the "MPRWA"), which is a joint powers authority. The MPRWA was formed by the cities of Carmel, Del Rey Oaks, Monterey, Pacific Grove, Sand City, and Seaside on the Monterey Peninsula, and is currently governed by the mayors of these cities.

The MPRWA was formed for the purpose of taking all actions deemed necessary by the MPRWA to ensure the timely development, financing, construction, operation, repair, and maintenance of one or more water supply projects to replace lost water supplies within the California-American Water Company service area on the Monterey Peninsula following a state cease and desist order regarding over-pumping of the Carmel River; to ensure that the governance of the projects includes representation that is directly accountable to the residents that are served; and to undertake any additional related or ancillary actions. To date, the majority of the MPRWA's time has been spent dealing with administrative procedure and organization.

The MPRWA is also seeking a consultant to evaluate three competing desalinization projects, which are entirely separate from MPRWA's anticipated water projects. Outside of the MPRWA, the City of Pacific Grove has already entered into an agreement to be the public agency sponsor of one of the three competing desalinization projects. Additionally, you were a candidate for a supervisorial race this year and have accepted \$6,000 in contributions from the City of Pacific Grove's private partner in the desalinization project.

ANALYSIS

Conflict-of-Interest Provisions

Generally, the Act's conflict-of-interest provisions prohibit any public official from making, participating in making, or using his or her official position to influence a governmental decision in which the official has a financial interest. (Section 87100.) A public official has a "financial interest" in a governmental decision, within the meaning of the Act, if it is reasonably foreseeable that the decision will have a material financial effect on one or more of the public official's economic interests. (Section 87103; Regulation 18700(a).)

Economic interests from which conflicts of interests may arise are defined in Section 87103 and Regulations 18703-18703.5 and include:

- An economic interest in a business entity in which the official has a direct or indirect investment of \$2,000 or more (Section 87103(a); Regulation 18703.1(a)); or in which the official is a director, officer, partner, trustee, employee, or holds any position of management (Section 87103(d); Regulation 18703.1(b)).
- An economic interest in real property in which the official has a direct or indirect interest of \$2,000 or more. (Section 87103(b); Regulation 18703.2.)
- An economic interest in a source of income to the official, including promised income, which aggregates to \$ 500 or more within 12 months prior to the decision. (Section 87103(c); Regulation 18703.3.)
- An economic interest in a source of gifts to the official if the gifts aggregate to \$420 or more within 12 months prior to the decision. (Section 87103(e); Regulation 18703.4.)
- An economic interest in the official's personal finances, including those of the official's immediate family. This is known as the "personal financial effects" rule. (Section 87103; Regulation 18703.5.)

A local government agency is not an organization or enterprise operated for profit, and therefore is not a "business entity" as defined by the Act. (Section 82005.) Moreover, salary received from a local agency is not considered income under the Act. (Section 82030(b)(2).) Accordingly, you have not identified a governmental decision or an economic interest recognized under the Act potentially affected by the decision implicating the Act's conflict-of-interest provisions. In itself, holding two offices simultaneously with the City of Pacific Grove and the MPRWA does not create a potentially disqualifying conflict of interest under the Act. (See e.g. *Minor Advice Letter*, No. I-06-052.)

If you need additional assistance in determining whether you are prohibited from making, participating in making, or influencing a decision that may affect an economic interest recognized under the Act, you should seek additional advice regarding the Act's conflict-of-interest provisions providing a description of the specific decision. You can also find more information regarding the conflict-of-interest provisions in the Commission's fact sheet entitled "Can I Vote? Overview of Conflicts Laws" at <http://www.fppc.ca.gov/index.php?id=37>.

Section 84308

In addition to the Act's conflict-of-interest provisions, Section 84308(c) disqualifies certain officials from taking part in a governmental decision involving a license, permit, or other entitlement for use if the official has received a contribution from a party or participant in the proceeding in the previous 12 months. In pertinent part, Section 84308(c) states:

“Prior to rendering any decision in a proceeding involving a license, permit or other entitlement for use pending before an agency, each officer of the agency who received a contribution within the preceding 12 months in an amount of more than two hundred fifty dollars (\$250) from a party or from any participant shall disclose that fact on the record of the proceeding. No officer of an agency shall make, participate in making, or in any way attempt to use his or her official position to influence the decision in a proceeding involving a license, permit, or other entitlement for use pending before the agency if the officer has willfully or knowingly received a contribution in an amount of more than two hundred fifty dollars (\$250) within the preceding 12 months from a party or his or her agent, or from any participant, or his or her agent if the officer knows or has reason to know that the participant has a financial interest in the decision, as that term is described with respect to public officials in Article 1 (commencing with Section 87100) of Chapter 7.”

Section 84308(b) does not apply to you in your capacity as the mayor of the City of Pacific Grove because it does not apply to officers in a proceeding before a local government agency whose members are directly elected by the voters. (Section 84308(a)(3).) While the MPRWA consist only of elected officers, the officers have not been directly elected to the MPRWA but to office in each their respective cities. Accordingly, Section 84308(b) does apply in your capacity as a member of the MPRWA and prohibits you from taking part in a proceeding involving a license, permit, or other entitlement for use pending before the MPRWA if the City of Pacific Grove’s partner in the desalinization project is a party or participant³ in the proceeding and you have received contributions aggregating to more than \$250 from the partner in the preceding 12 months.

At this time, you have not however identified (and do not anticipate) any proceeding before the MPRWA involving a license, permit, or entitlement for use. If in the future you need further assistance determining whether you may take part any particular proceeding before the MPRWA under Section 84308, you should seek additional advice fully describing the proceeding.

Laws Outside of the Act

Laws outside the jurisdiction of the Commission may restrict a public official from holding two public offices simultaneously, if those offices are determined to be “incompatible” offices. You are urged to check with the legal counsel retained by either of your agencies to determine if there are other laws that may be applicable, in light of the facts you present, that may cause a problem under the doctrine of incompatible offices. As stated above, the

³ A “party” is “any person who files an application for, or is the subject of, a proceeding involving a license, permit, or other entitlement for use,” and a “participate” is “any person who is not a party but who actively supports or opposes a particular decision in a proceeding involving a license, permit, or other entitlement for use and who has a financial interest in the decision....” (Section 84308(a)(1) and (2).)

Commission's advice is limited solely to matters arising under the Act. (Regulation 18329(b)(8)(d).).

If you have other questions on this matter, please contact me at (916) 322-5660.

Sincerely,

Zackery P. Morazzini
General Counsel

By: Brian G. Lau
Counsel, Legal Division

BGL:jgl